Supreme Court, U.S.
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In The
Supreme Court of the United States

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GARY L. BROBSTON,
Petitioner,

v.

INSULATION CORPORATION OF AMERICA,
Respondent.

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Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

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# PETITION FOR WRIT OF CERTIORARI

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**QUESTIONS PRESENTED FOR REVIEW**

1. Whether or not the trial court emasculated ADEA by holding that direct evident of age discrimination -- "I can hire a couple of young bucks for what I am paying you" -- is not sufficient to take case to jury?

2. Whether or not the District Court erred as a matter of law by resolving question of fact about the identity of the employees who replaced Petitioner in favor of Respondent when Respondent failed to disclose the relevant documents?

3. Whether or not the District Court erred as a matter of law in granting Respondent's Motion for Summary Judgment because the United States Magistrate Judge found that **"the weight of the evidence indicates that Brobston's job performance was not satisfactory"?**

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No. _____

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PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner, Gary L. Brobston, prays that a Writ of Certiorari issue to review judgment of the U.S. Court of Appeals, Third Circuit.

## OPINIONS BELOW

The Order of the U.S. Court of Appeals, Third Circuit, rendered on December 18, 1995 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered on May 23, 1994 is unrecorded and appears at page 3a of the Appendix herein.

The final Order of the Court of Appeals for the Third Circuit was dated December 18, 1995 and this Petition for Certiorari is timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. § 1254(1) and Rule 17 of this Honorable Court.

## FEDERAL PROVISION INVOLVED

29 U.S.C § § 621-638 at Appendix 31a.

**STATEMENT OF THE CASE**

Petitioner filed this action seeking damages arising from Respondent's allegedly illegal termination of Petitioner in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

The United States District Court granted Respondent's Motion for Summary Judgment on April 5, 1994. Whereupon, Petitioner filed a Motion to Reconsider that Order, which was denied on May 23, 1995. On December 18, 1995, The Third Circuit of U.S. Court of Appeals affirmed. Petitioner now respectfully seeks review by this Honorable Court.

**REASON RELIED UPON FOR ALLOWANCE OF THE WRIT**

The Court of Appeals for the

Third Circuit has rendered an Order which sanctions a decision by the United States District Court for the Eastern District of Pennsylvania which is so far departed from the accepted and usual course of judicial proceedings that an exercise of the Supreme Court's power of supervision is appropriate. Specifically, the District Court unilaterally discounted Petitioner's proffered direct evidence of age discrimination because it was "self-serving," and made plain errors about the first time such evidence appeared in the record. The District Court failed to view direct evidence of age discrimination, as well as evidence of pretext, in the light most favorable to the non-movant at the Summary Judgment stage, and made its own credibility determinations. In

fact, the District Court admittedly "weighed" evidence at the Summary Judgment stage.

Particularly in a situation where the Court of Appeals for the Third Circuit affirmed the District Court without opinion, and where the District Court is apparently at odds with prior decisions of the Third Circuit, Petitioner prays that this Honorable Court will exercise its powers of review to redress the apparently egregious errors made by the United States Magistrate Judge in the District Court.

**STATEMENT OF THE FACTS**

Petitioner was continuously employed by Respondent from October, 1982 until August 13, 1993, at which time he was terminated.

Petitioner filed a claim of Age

Discrimination with the EEOC on September 17, 1993. Petitioner then filed a complaint in the United States District Court for the Eastern District of Pennsylvania on or about May 29, 1994, alleging that he was terminated due to his age in violation of the ADEA. Shortly thereafter, EEOC investigator Mr. Stanford Lamb wrote directly to Petitioner, asking him for additional information which could be placed on the EEOC record. In response to this request, Petitioner himself, acting without the assistance of counsel, wrote a supplemental letter to Mr. Lamb, dated June 20, 1994, in which he alleged that he was terminated because, for his salary, Respondent said it could afford to hire "a couple of young bucks." Because a charge had been filed in the

District Court, the EEOC discontinued its investigation pursuant to normal policy on August 9, 1994.

Respondent's filed a Motion for Summary Judgment in the District Court, which was granted on April 5, 1995. The District Court denied Petitioner's subsequent Motion to Reconsider on May 23, 1995.

## ARGUMENT

**1. WHETHER OR NOT THE TRIAL COURT EMASCULATED ADEA BY HOLDING THAT DIRECT EVIDENT OF AGE DISCRIMINATION -- "I CAN HIRE A COUPLE OF YOUNG BUCKS FOR WHAT I AM PAYING YOU" -- IS NOT SUFFICIENT TO TAKE CASE TO JURY?**

A. Petitioner's direct evidence of age discrimination was improperly discounted because the District Court found it to be "self-serving." In his

opinion, the United States Magistrate Judge discounted Petitioner's "self-serving" claim that he was told by Tom Higgins, Chairman of the Board for Respondent, that for Petitioner's salary, he could afford to hire "a couple of young bucks." The Magistrate Judge relied upon Healy v. New York Life Ins. Co., 860 F.2d 1209, 1215 (3d Cir. 1988), which is curious because the Third Circuit held there that while "self-helpful" statements, "may be to some degree suspect," a post hoc statement does not in and of itself make the statement untrustworthy. Id. In fact, in affirming the granting of Summary Judgment for the Defendant, there, the Third Circuit specifically found that Summary Judgment was appropriate because the plaintiff had produced no

counter-affidavits or argumentation, which Petitioner in this case has clearly done. Id. In fact, the Third Circuit has defined direct evidence of age discrimination as, "evidence which, *if believed*, would prove the existence [of the fact] without inference or presumption." Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994) (emphasis added). Therefore, the Magistrate Judge's decision is not in accord with Third Circuit authority, and reflects judicial weighing that is clearly improper at the Summary Judgment stage.

B. The Magistrate Judge ignored the EEOC record when determining that Petitioner's direct evidence was not offered until after Respondent filed its Motion for Summary Judgment. In making his credibility determination,

the United States Magistrate Judge found that Petitioner did not allege that he was told by Respondent that, **"I could hire a couple of young bucks for what I'm paying you"** until after Respondent filed its Motion for Summary Judgment. Assuming *arguendo* that such a credibility determination is appropriate at the Summary Judgment stage, the Magistrate Judge's finding is clearly contradicted by the EEOC record. Petitioner wrote a letter to EEOC investigator Stanford Lamb on June 20, 1994 alleging that he was told he was being terminated because Respondent "can hire a couple young bucks" for Petitioner's salary. This letter was written **more than six months** before Respondent filed its Motion for Summary Judgment. Although Respondent denied making this remark

about hiring "young bucks," at the very least, Petitioner presented a genuine issue of material fact which would preclude summary judgment.

C. Telling an employee that he is being fired because the employer "can afford to hire a couple of young bucks for what I'm paying you" is direct evidence of age discrimination. This Honorable Court has held that an employer's policy which provides disparate treatment for older employees can count as direct evidence of age discrimination. Trans World Airlines v. Thurston, 469 U.S. 111 (1985). However, the Third Circuit has not read this requirement to preclude other types of evidence from counting as direct evidence. In a gender discrimination case, a police chief's statement to a female

applicant that, "[the township commissioner] wants a man for the job" as an excuse for passing her over was direct evidence of gender discrimination. Wilson v. Susquehanna Twp. Police Dept., 55 F.3d 126, 128 (3d Cir. 1995). In the case at bar, Petitioner was told that he was being fired because Respondent would rather hire "a couple young bucks" for the same salary. Such a statement requires no inference or presumption to conclude that Petitioner was fired because Respondent would prefer to have "young bucks" working for it, instead of the 49 year old Petitioner, who is no longer a "young buck." Respondent's statement is clearly direct evidence that Respondent was firing Petitioner due to Petitioner's age, which precludes Summary Judgment.

**2. WHETHER OR NOT THE DISTRICT COURT ERRED AS A MATTER OF LAW BY RESOLVING A QUESTION OF FACT ABOUT THE IDENTITY OF EMPLOYEES WHO REPLACED PETITIONER IN FAVOR OF RESPONDENT WHEN RESPONDENT FAILED TO DISCLOSE THE RELEVANT DOCUMENTS?**

A. The District Court relied solely upon one witness's deposition to conclude that Petitioner was not replaced by a younger worker, and ignored other deponents' testimony to the contrary. The Magistrate Judge indicated that Petitioner failed to establish a *prima facie* case of age discrimination because of **hearsay** claims Michael Marsh, a 54 year old employee, assumed roughly 80% to 90% of Petitioner's duties after Petitioner was terminated.

Thereafter, the Magistrate recognizes that two other employee's who are outside of the protected age class also testified that part of Petitioner's duties went to them after Petitioner was fired. However, the Magistrate Judge **ignored** these conflicting accounts, and summarily concluded that Petitioner has not met his burden to establish that he was replaced by a younger person or persons. At the very least, the testimony of these deponents -- and the hearsay basis concerning Marsh's job function -- produces a genuine issue of material fact which would make Summary Judgment inappropriate.

B. The District Court failed to hold an *in camera* hearing which would conclusively establish who took over Petitioner's sales accounts, and chose

instead to believe the testimony of one of Respondent's witnesses. The nature of Petitioner's salesman job was that he, and only he, sold Respondent's products with a certain specified code number. On Monthly Product Summary sheets submitted by every salesman, the code numbers indicate who is selling which product. If these Monthly Product Summaries are examined, one can easily see who assumed Petitioner's job responsibilities. At a conference on February 28, 1995, the District Court indicated that after looking at Respondent's Motion for Summary Judgment, the District Court would decide whether or not an *in camera* hearing should be held, where those Monthly Product Summaries could be confidentially examined. However, the

District Court never held that *in camera* hearing, and the Monthly Product Summaries have never been examined by Petitioner or by the District Court. Nevertheless, the District Court has resolved a genuine issue of material fact, i.e. who replaced Petitioner, in favor of the Respondent, which is improper at the Summary Judgment stage.

3. **WHETHER OR NOT THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE UNITED STATES MAGISTRATE JUDGE FOUND THAT "THE WEIGHT OF THE EVIDENCE" INDICATES THAT BROBSTON'S JOB PERFORMANCE WAS NOT SATISFACTORY"?**

The District Court admittedly engaged in "weighing" evidence at the Summary Judgment stage to find that

Petitioner offered no evidence of pretext. Respondent's alleged legitimate business reason for terminating Petitioner was inadequate job performance. Respondent admitted that when Petitioner was fired, Petitioner had increased sales volume in his territory by more than 20%. The Respondent also alleged that Petitioner failed to make 3 overnight stays per week, in violation of company policy. Petitioner offered credit card receipts as evidence to show that out of three salespeople, there was only one week in all of 1993 when a salesman made 3 overnight stays per week. Again, the Magistrate Judge ignored Petitioner's evidence, and specifically held that "the weight of the evidence indicates that Brobston (sic) performance was not satisfactory

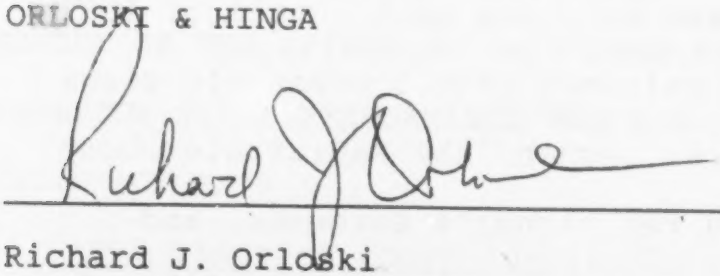
**because of his failure to adhere to company policy."** 29a A genuine issue of material fact clearly exists as to Respondent's proffered legitimate business reasons for firing Petitioner or else the District Court would not have had to "weigh" conflicting evidence in granting Summary Judgment for the Respondent.

## CONCLUSION

For the foregoing reason, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI & HINGA



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 95-1491

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GARY L. BROBSTON,

Appellant

v.

INSULATION CORPORATION OF AMERICA

---

Appeal of the United States District Court for the Eastern District of Pennsylvania D.C. Civil Action No. 94-cv-3315
(District Magistrate Judge: Honorable Arnold C. Rapoport)

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Argued: December 12, 1995

Before: BECKER, ROTH and LEWIS, Circuit Judges.

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JUDGEMENT ORDER

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After consideration of all contentions raised by appellant, it is ADJUDGED AND ORDERED that the orders of the district court of April 5, 1995 and May 25, 1995 be and are

hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT:

/s/ Becker
Circuit Judge

Attest:

/s/ P.Douglas Sisk
P. Douglas Sisk, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

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|---|---|---|
| GARY L. BROBSTON, | : | CIVIL ACTION |
| | : | |
| Plaintiff | : | No. 94-3315 |
| | : | |
| vs. | : | |
| | : | |
| INSULATION CORPORATION OF AMERICA, | : | JURY TRIAL DEMANDED |
| | : | |
| Defendant | | |

ORDER

AND NOW, THIS 23 day of May, 1995 upon consideration of the Plaintiff's Motion to Reconsider Order of April 5, 1995 and Defendant's Reply thereto,

It is hereby ORDERED AND DECREED that Plaintiff's said Motion is DENIED.

BY THE COURT:

/s/ Arnold C. Rapoport
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

| | | |
|---|---|---|
| GARY L. BROBSTON | : | CIVIL ACTION |
| | : | |
| v. | : | |
| | : | |
| INSULATION CORPORATION OF AMERICA | : | No. 94-33315 |

MEMORANDUM

ARNOLD C. RAPOPORT JUNE 30TH, 1995
UNITED STATES MAGISTRATE JUDGE

Plaintiff Gary L. Brobston ("Brobston") brought this action against defendant Insulation Corporation of America ("ICA") alleging that he was unlawfully terminated due to his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § § 621-634. ICA moved for summary judgement on the ground that Brobston failed to establish a *prima facie* case of age discrimination, and, in the alternative, that ICA had demonstrated

legitimate business reasons for Brobston's termination which he had failed to demonstrate were pretextual. This Court granted Defendant's Motion for Summary Judgement on April 5, 1995. Plaintiff filed a Motion to Reconsider the order granting Defendant's Motion for Summary Judgment, which was denied by this Court on May 23, 1995. The reasons for my granting of ICA's motion for summary judgment and subsequent denial of Brobston's motion to reconsider are stated below.

I. Factual Background

On August 13, 1993, Gary Brobston, who at the time was forty-seven years of age, was terminated from his employment at ICA. (Brobston N.T. at 19). Shortly thereafter, ICA sought a Preliminary Injunction

against Brobston in the Lehigh County Court of Common Pleas alleging that he violated the covenant not to compete contained in his employment contract with ICA. On December 17, 1993, a temporary order was granted pursuant to ICA's petition for the preliminary injunction. (Def.'s Mot. S.J. Ex. 3). A hearing in regard to the preliminary injunction was held on December 23, 1993, and a preliminary injunction enjoining plaintiff Brobston from disclosing confidential business information and from competing with ICA customers was granted on December 30, 1993. (Def.'s Mot. S.J. Ex.'s 4, F). On or about May 29, 1994, Brobston filed a complaint in this Court alleging that he was terminated on the basis of age in violation of the ADEA.

Brobston began working for ICA in 1982 as a territorial sales manager. In 1985 he was promoted to national account sales manager. In 1990 Brobston was promoted to general manager of ICA. In July 1990 he entered into a written employment contract with ICA that included the restrictive covenant which was the subject of ICA's prior action. (See Def.'s Mot. S.J. Ex. A, ¶ 5). In November 1992, Brobston's job position changed to Vice President of Special Products. His new responsibilities included the following: 1) the development of new customers in Territory 60, which involved the sale of specialty products using a CAD computer system; and 2) the assumption of the job duties of a retiring employee, which involved the sale of

commodity products in Territory 80. (Pl.'s Brief Opp. S.J. at 2).

ICA contends that Brobston was terminated in August 1993 because of his inadequate performance in his position as Vice President of Specialty Sales. Among the reasons for dismissal, ICA cites Brobston's failure to turn in weekly expense accounts, an inadequate amount of time spent on the road visiting customers, his failure to follow management's instructions to increase the amount of time spent visiting customers, and an overall inadequate amount of sales. (See generally Def.'s Mot. S.J. Ex.'s 4, 7, 8).

Brobston argues that he was terminated due to his age. He alleges that management told him that they could no longer afford him and that

the were going to replace him with "a couple of young bucks," which he contends ultimately occurred. He also contends that his job performance was adequate. (See generally Brobston Aff.).

II. Legal Standard

Entry of summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Thus, if there is no genuine issue of material fact, "the moving party is entitled to a judgment as a matter of law." Id. A genuine issue of material fact exists "if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of identifying for the Court those portions of the record that demonstrate no genuine issue as to material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this requirement, the burden shifts to the nonmoving party to present evidence on the record that there is a genuine issue of fact. Id. at 324; Fed.R.Civ.P. 56(e). Additionally, all inferences must be drawn, and all doubts resolved, in favor of the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Gans v. Mundy, 762 F.2d 338, 340 (3d. Cir.), cert. denied, 474

U.S. 1010 (1985).

III. Discussion

In an age discrimination claim, a plaintiff must first establish a *prima facie* case of discrimination. The Third Circuit has held that, in the absense of direct evidence, the four elements a plaintiff is required to show to establish a *prima facie* case of age discrimination claim are that the plaintiff: 1) is at least forty years of age; 2) was qualified for the position; 3) was terminated despite being qualified; and 4) was ultimately replaced by a sufficiently younger person such that an inference of age discrimination is raised. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3d Cir. 1992) (citing Billet v. Cigna Corp., 940 F.2d 812, 816 n. 3

(3d. Cir. 1991)).

An inference of unlawful discrimination is created if the plaintiff succeeds in establishing a *prima facie* case. Gray, 957 F.2d at 1078. The burden then shifts to the defendant to dispel the inference by articulating legitimate, nondiscriminatory business reasons for the plaintiff's dismissal. Id. If this burden is met by the defendant, the plaintiff then is required to demonstrate by a preponderance of the evidence that the articulated reasons are a pretext for the discrimination. Id.; Billet, 940 F.2d at 816. However, at all times the plaintiff has the burden of proving that age was the determinative factor in the defendant's decision to terminate the plaintiff. Gray, 957 F.2d at 1078;

see also Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir. 1987) (stating that plaintiff "must prove age made a difference in the decision").

A. Plaintiff has failed to establish a *prima facie* case of age discrimination

Here, plaintiff Brobston has offered no direct evidence of age discrimination. Also, Brobston had failed to establish a *prima facie* case of age discrimination because he has not established all four factors articulated in Gray v. York Newspaper, Inc. in that he has not demonstrated that he was replaced by a sufficiently younger person.

Brobston first argues that direct evidence exists to support his age discrimination claim. However, the only evidence he offers is a self-

serving statement, included in his March 1994 affidavit, that he was told by Tom Higgins, Chairman of the Board of ICA, that he was being terminated because "I can hire a couple of young bucks for what I am paying you." (Brobston Aff. ¶ 22). Such assertions must be viewed cautiously because "any self-helpful statement made after the initiation of a lawsuit...may be to some degree suspect." Healy v. New York Life Ins. Co., 860 F.2d 1209, 1215 (3d Cir. 1988). Furthermore, this statement is clearly inconsistent with Brobston's prior sworn testimony. At his deposition on February 10, 1995, Brobston testified as follows:

Q. Did anyone at ICA ever tell you directly that the reason for your termination was because of how old you were?

A. No.

Q. Did you ever read any documentation that indicated directly that the reasons for your termination was because how old you were?

A. I didn't read anything, no. (Brobston Dep. at 88). Thus Mr. Brobston's affidavit allegations directly contradict his prior sworn deposition testimony.[1] Furthermore, Mr. Higgins strongly denies that he ever verbalized to plaintiff that "I can hire a couple of young bucks for what I am paying you," (Higgins Aff.

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1. It is also notable that Brobston's affidavit is dated March 4, 1995, which is three days after Defendant's Motion for Summary Judgment was served on plaintiff's attorney. A review of the record prior to the date of Brobston's affidavit reveals that nowhere in his prior testimony did he ever make reference to the alleged statements by Mr. Higgins. (See Brobston N.T., Brobston Dep.).

of Apr. 3, 1995, ¶ 3), and Mr. Dean, President of ICA and who was also present at the time of this alleged statement, also denies that it was ever made. (Dean Aff. of April 3, 1995, ¶ 11). Therefore, Brobston's allegation is insufficient to constitute direct evidence of age discrimination.

Brobston has also failed to establish a *prima facie* case of age discrimination because the preponderance of the evidence does not demonstrate that he was ultimately replaced by a younger person. Michael Marsh, manager of commodity sales at ICA and who at fifty-four years of age at the time of Brobston's termination was roughly seven years older than Brobston, indicated that he assumed approximately eighty to ninety percent

of the sales route that was formerly part of Brobston's duties. (Marsh N.T. at 197; Marsh Aff. ¶ 5). Joyce Tshudy (formerly Tarsovich), a former salesperson at ICA, testified that upon Brobston's termination his responsibilities were divided among herself, Michael Marsh, and Alan Colorito, with the majority of the accounts going to Marsh. (Tshudy Dep. at 35). Alan Colorito, also indicated that Brobston's responsibilities were divided between himself, Joyce Tshudy, and Michael Marsh. Although he did not know exactly how they were divided, he stated that he received only one of Brobston's accounts. (Colorito Dep. at 33-34).

Brobston argues that the evidence indicates that his responsibilities were assumed by Alan Colorito, then

twenty-five, and David Boston, then thirty-two, the alleged "young bucks." The record indicates, however, that Alan Colorito began working at ICA in March 1993, five months before Brobston was terminated, and that he only undertook one of Brobston's accounts. (Colorito Dep. at 7, 33-34). Furthermore, the evidence establishes that David Boston was hired in February 1994 to replace Joyce Tshudy, who left ICA voluntarily at that time. (Boston Dep. at 6, 21; Tshudy Dep. at 30; Colorito Dep. at 41-42). Therefore, Brobston has failed to demonstrate any evidence that he was replaced by a sufficiently younger person.

Brobston has failed to establish age discrimination though the use of direct evidence. He has also failed

to establish a *prima facie* case under the four elements articulated in Gray v. York Newspaper, Inc. because he has not demonstrated that he was replaced by a sufficiently younger person. Thus summary judgement is appropriate in this case.

B. ICA has proffered legitimate business reasons for Brobston's termination and Brobston has not offered any evidence that ICA's reasons are a pretext

Assuming, *arguendo*, that Brobston has established a *prima facie* case of age discrimination, summary judgement is still appropriate because ICA has articulated legitimate business reasons for dismissing Brobston, and he has not presented reasonably sufficient evidence that ICA's articulated reasons are a pretext for discrimination. E.g., Perry v. Prudential-Bache Securities, Inc., 738

F.Supp. 843, 852 (D.N.J. 1989), aff'd 904 F.2d 696 (3d. Cir. 1990). Thus there is no evidence to establish that age was the determinative factor in the dismissal Brobston.

Once a *prima facie* case has been established by the employee, the burden shifts to the employer to offer legitimate business reasons for the employee's termination. Gray, 957 F.2d at 1078. The Third Circuit has pronounced this burden to be "relatively light." Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). Furthermore, the employer does not need to prove that the offered reasons were what actually motivated its behavior because the ultimate burden of proving discrimination is always on the employee. Id. (citing Texas Dep't of Community Affairs v.

Burdine, 450 U.S. 248. 253-256 (19981)). In this case ICA has offered sufficient grounds for dismissal to carry its burden.

In November 1992, Brobston's job position changed, and his new responsibilities included the following: 1) the development of new customers in Territory 60, which involved the sale of specialty products using a CAD computer system; and 2) the assumption of the job duties of a retiring employee, which involved the sale of commodity products in Territory 80. (Pl.'s Brief Opp. S.J. at 2).

Defendant ICA has presented a number of business reasons why Brobston was terminated. ICA indicated that while Brobston was in his new position from November 1992

until August 1993, the sales in Territory 60 were negligible, a fact to which Brobston concedes. (Brobston N.T. at 45; Dean Aff. of Feb. 27, 1993, ¶ 13; Higgins Aff. of Mar. 2, 1993, ¶ 6; Def.'s Mot. S.J. Ex 15).

As part of his responsibilities, Brobston was required to be on the road visiting his customers and had to submit weekly expense reports. (Dean N.T. at 158-61; See Def.'s Mot. S.J. Ex. 2.) ICA asserts that Brobston's performance was deficient because he only submitted thirteen expense reports in the thirty-two week period from January 1993 through mid-August 1993. (Dean N.T. at 158-61).

ICA further contends that Brobston was not adequately performing his duties in that he was not sufficiently contacting his customers.

(Dean N.T. at 157-60; Higgins Aff. of Mar. 2, 1993, ¶¶ 4-9). ICA argues that Brobston failed to adhere to the company policy of sales representative spending approximately three overnight stays per week for the purpose of sales calls. Id. In the aforementioned thirty-two week period, Brobston made only thirteen overnight visits out of a possible ninety-six if he had been following company policy. Id. Mr. Dean, President of ICA, informed Brobston that his performance was not satisfactory four times from January 1993 though August 1993, and Brobston had also been warned that he was not to come into the Allentown plant, except on Fridays, from January 1993 though August 1993 because he was supposed to be visiting customers. (Brobston N.T. at 42; Dean N.T. at

158-61). Finally, due to his concern about Brobston's performance, Mr. Dean accompanied him on a trip in the beginning of August 1993 in an effort to determine how often Brobston was contracting customers. After this trip, Mr. Dean was of the opinion that Brobston had not been contacting clients in an acceptable manner. (Dean N.T. at 161-62). Furthermore, Brobston himself indicated that he was aware Mr. Higgins, Chairman of the Board of ICA, was unhappy with his performance. (Def.'s Mot. S.J. Ex. 16).

Therefore, the evidence establishes that ICA has met its burden in articulating legitimate business reasons for Brobston's dismissal. Once the employer meets its burden, the employee "must prove by a preponderance of the evidence

that the articulated reasons are a pretext for [age] discrimination." Gray, 957 F.2d at 1078; Billet v. Cigna Corp, 940 F.2d 812, 816 (3d Cir. 1991). The plaintiff employee can meet this burden "either 'directly by persuading the court that a discriminatory reason more likely [than not] motivated the employer or indirectly by showing the employers's proffered explanation is unworthy of credence.'" Gray, 957 F.2d at 1078 (quoting Billet, 940 F.2d at 816).

Brobston argues that, although he was required to be on the road as part of his job responsibilities, he was unaware of any company policy requiring sales representatives to make three overnight stays per week. (Brobston N.T. at 36-37). However, Joyce Tshudy, David Boston, and Mike

Marsh, sales representatives, all indicated that they were instructed to make three overnight stays per week as part of their job responsibilities. (Tshudy Dep. at 33; Boston Dep. at 22; Marsh Aff. ¶ 7). Mr. Dean, President of ICA, also testified that it was company policy for salespersons to make three overnight stays per week. (Dean N.T. at 157-58). Moreover, business records indicate that all other salespersons had substantially more overnight stays than did Brobston. (Def.'s Mot. S.J. Ex. B).

Brobston also contends that, although sales in Territory 60 were negligible, sales in Territory 80 during the time period he was employed were up $100,000 from the previous year due to his efforts. (Brobston Aff. ¶¶ 12-16). Although it concedes

sales in Territory 80 were up from the previous year, ICA attributes the increase to two primary reasons: 1) a technological improvement in the manufacturing process which improved the quality of the product sold and resulted in the return of former lost customers, a fact to which Brobston acknowledged; and 2) an exclusive selling agreement which the President of ICA, Mr. Dean, personally negotiated himself in late 1992. (Dean N.T. at 166-169; Higgins N.T. at 205-07; Brobston N.T. at 129-30; Dean Aff. of Feb. 27, 1993, ¶ 14).

Brobston also acknowledged that, during his employment with ICA, the primary reason for the termination of a salesperson was an inadequate number of sales, and that during his employment he personally was

responsible for terminating employees under forty years of age. (Def.'s Mot. S.J. Ex. 28). The record further demonstrates that Gregory Kester, a thirty year old salesperson, was terminated in March of 1993 due to inadequate performance, which included failure to make the required number of overnight stays per week. (Dean Aff. ¶ 17; see Def.'s Mot. S.J. Ex. B). There is also no evidence in the record that ICA had a history of age discrimination regarding its hiring and firing practices. (See Def.'s Mot. S.J. 4, 28).

Brobston has failed to establish by direct evidence that a discriminatory reason motivated ICA in his termination rather than ICA's proffered legitimate reasons. There is no pattern of discrimination in

ICA's hiring and firing practices, and Brobston has offered no evidence that ICA's termination of him was due to his age. Supra Part A. Furthermore, Brobston has offered no evidence that ICA's reasons for his termination were not credible. There is no doubt that the sales in Territory 60 were negligible. Although sales in Territory 80 were up, Brobston also acknowledged that this was partially due to improvements in the product and not his efforts. Finally, the weight of the evidence indicates Brobston performance was not satisfactory because of his failure to adhere to company policy, including the number of required overnight visits and the filing of weekly expense reports.

Thus, ICA offered numerous legitimate, nondiscriminatory reasons

for Brobston's termination, and Brobston has not offered any evidence indicating that ICA's reasons for terminating him were a pretext. Additionally, Brobston has presented no evidence that ICA's motives in terminating him were attributable to his age. See Retter v. Georgia Gulf Corp., 755 F.Supp. 637, 643 (D.N.J. 1991). Therefore, because Brobston has failed to offer any evidence that age was the determinative factor in ICA's decision to terminate him, summary judgement is appropriate in this case.

/s/ Arnold C. Rapoport
ARNOLD C. RAPOPORT
UNITED STATES MAGISTRATE JUDGE

§ 623. Prohibition of age discrimination

It shall be unlawful for an employer--

"(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(3) to reduce the wage rate of any employee in order to comply with this chapter."

Supreme Court, U.S.
FILED
APR 23 1996
CLERK

(2)

NO. 95-1537

---

IN THE SUPREME COURT OF THE UNITED STATES

---

GARY L. BROBSTON,

Petitioner

vs.

INSULATION CORPORATION OF AMERICA, INC.

Respondent

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

---

# RESPONDENT'S BRIEF

---

Herbert M. Rafner,
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4799

## QUESTIONS PRESENTED:

1. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS NO DIRECT EVIDENCE OF AGE DISCRIMINATION.

2. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

3. WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT ESTABLISHED LEGITIMATE BUSINESS REASONS FOR THE TERMINATION, AND THAT AGE WAS NOT A DETERMINATIVE FACTOR IN THE TERMINATION OF PETITIONER.

## LIST OF INTERESTED PARTIES

The Petitioner is Gary L. Brobston

The Respondent is Insulation Corporation of America, Inc.

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Respondent, Insulation Corporation of America, Inc. has a parent corporation by the name of Northern Lehigh Erectors, Inc.

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NO. 95-1537

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SUPREME COURT OF THE UNITED STATES

---

GARY L. BROBSTON,

Petitioner

vs.

INSULATION CORPORATION OF AMERICA, INC.

Respondent

---

**ON PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

---

# RESPONDENT'S BRIEF

---

## OPINIONS AND JUDGMENTS IN THE COURT BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania authored by Magistrate Judge Arnold C. Rapoport is unreported and appears at page 1(a) of the Petitioner's Appendix. Furthermore, the decision of the United States Court of Appeals

for the Third Circuit authored by Judge Becker and joined by Judge Roth and Judge Lewis is not reported and appears at page 3(a) of the Petitioner's Appendix. Also, the United States Court of Appeals for the Third Circuit denied the Petitioner's "Motion to File Supplemental Appendix" on December 21, 1995. The Order is attached hereto at page 1(a) of the Respondent's Appendix.

## COUNTER-STATEMENT OF THE CASE

### A. FACTUAL BACKGROUND

Petitioner, Gary L. Brobston seeks a Writ of Certiorari to review an order of the United States Court of Appeals for the Third Circuit which affirmed the United States District Court for the Eastern District of Pennsylvania's decision to grant Respondent's Motion for Summary Judgment. In essence, Petitioner has failed to establish a genuine issue of material fact regarding age discrimination because Respondent replaced Petitioner with an employee who was seven years older than he.

(Petitioner's Appendix at 16a-19a).

On August 13, 1993 Petitioner, Gary Brobston was terminated from his sales position at the Respondent's place of business for legitimate business reasons. Shortly thereafter, Petitioner wilfully violated the covenant not to compete in his employment contract by contacting Respondent's customers. Respondent sought a Preliminary Injunction against Petitioner in the Lehigh County Court of Common Pleas regarding the violation of the Covenant not to Compete. On December 17, 1993, a temporary order was granted pursuant to Respondent's Petition for the Preliminary Injunction. On December 30, 1993, Respondent's Request for a Preliminary Injunction was granted which enjoined the Petitioner from disclosing confidential business information and from competing with Respondent's customers. On November 3, 1995, the Pennsylvania Superior Court affirmed in part and reversed in part the trial court's decision. The Superior Court

affirmed the trial court's grant of a Preliminary Injunction as to the "non-disclosure" clause of the employment agreement and reversed the trial court's enforcement of the "non-competitive" clause. (See Insulation Corporation of America v. Brobston, 1995 WL 644094 (Nov. 3, 1995)).

On or about May 29, 1994, Petitioner filed a Complaint in the United States District Court for the Eastern District of Pennsylvania alleging that he was terminated on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (hereinafter "ADEA"). During the course of the Petitioner's deposition, Respondent learned that Petitioner refused to return Respondent's confidential business records which were allegedly discovered by Petitioner in his closet at home. (Respondent's Memorandum of Law in Support of Motion for Summary Judgment at 5-Respondent's Appendix at 3(a)). On March 27, 1996, Petitioner was found in contempt of court

for failing to return Respondent's confidential business records. (Respondent's Appendix at 6(a)).

After working for Respondent since 1982, Petitioner's job position changed to Vice President of Specialty Products in November of 1992. Petitioner's new responsibilities included the following:

1) The development of new customers in Territory 60, which involved the sales of specialty products using a CAD computer system; and

2) The assumption of the job duties of a retiring employee, which involved the sale of existing commodity products in Territory 80. (Petitioner's Appendix at 7(a)-8(a)).

Petitioner was terminated in August of 1993 because of his inadequate performance in his position as Vice President of Specialty Products. Petitioner was terminated due to his failure to turn in weekly expense accounts, his inadequate amount of time spent on the road

visiting customers, his failure to follow Respondent's instructions, grossly deficient performance in Territory 60, and an overall inadequate amount of sales. (Petitioner Appendix at 8(a)).

B. CORRECTION OF MISSTATEMENTS IN THE PETITION

Pursuant to the United States Supreme Court Rule 15.2, Respondent brings the following misstatements of fact contained in the Petition to the Court's attention. Specifically, Petitioner alluded to certain information that was allegedly contained in an EEOC investigation file. (Petition at 6, 10). This information was never produced to the Respondent through the course of discovery during the trial court action. Also, the information was never made a part of the record that was before the United States District Court for the Eastern District of Pennsylvania or the Court of Appeals for the Third Circuit. Realizing this apparent error, counsel for Petitioner filed a "Motion to File Supplemental Appendix" with the Clerk of the

United States Court of Appeals for the Third Circuit. On December 21, 1995, said Motion was denied. (See Respondent's Appendix at 1(a)).

Petitioner further misleads this Court by alleging that he should have been given access to a "monthly product summary report" and that the District Court should have held an in camera inspection of records. However, Petitioner never filed a Motion to Compel the production of this alleged "monthly product summary report". Furthermore, Petitioner failed to file an Affidavit for a Continuance of the Determination of Respondent's Motion for Summary Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents, take depositions or to formally request an in camera inspection of records. As a result, Petitioner has failed to preserve this issue on appeal.

Petitioner inaccurately asserts that the claims of Respondent's older worker, Michael Marsh, (who replaced the Petitioner) were based on hearsay. (Petition at 13). However, the

fact remains that the Respondent properly submitted an affidavit by Michael Marsh, pursuant to F.R.Civ.P. 56, which established that he assumed approximately 80-90% of Petitioner's responsibilities after termination. Indeed, the United States District Court properly found that Petitioner failed to established a prima facie case of age discrimination because Mr. Marsh, who was approximately seven years older than Petitioner, assumed a large majority of Petitioner's work duties.

Petitioner further misconstrues the law under the ADEA by condemning the District Court for "weighing" evidence at the summary judgment stage of the case. (Petition at 16-17). Pursuant to the ADEA, it was appropriate for the District Court to find that Respondent's legitimate business reasons for the termination were credible, and that the record was devoid of any pretext. Furthermore, it was proper for the Court to decide that there was no genuine issue

for trial because age was not a determinative factor in the termination of Petitioner.

## REASONS FOR DENYING THE WRIT

### I. THE DISTRICT COURT PROPERLY DETERMINED THAT THERE WAS NO DIRECT EVIDENCE OF AGE DISCRIMINATION.

Petitioner never established direct evidence of age discrimination. In response to the imminent dismissal of his lawsuit, Petitioner included a self-serving statement in his March 1994 affidavit. Petitioner alleged that Respondent's Chairman of the Board stated that Petitioner was being terminated because "I can hire a couple of young bucks for what I am paying you". (Petitioner Appendix at 14(a)). In his Petition, Petitioner misconstrues Healy v. New York Life Ins. Co., 860 F.2d 1209, (3d Cir. 1988). (See Petition at 8). The Healy case dealt with a post-hoc evaluation by the employer regarding the employee's performance. In the present case, however, Petitioner filed a self-serving affidavit that directly contradicted his prior sworn deposition

testimony.

Specifically, Petitioner testified at his deposition on February 10, 1995 as follows:

> Q. Did anyone at ICA ever tell you directly that the reason for your termination was because of how old you were?
>
> A. No.
>
> Q. Did you ever read any documentation that indicated directly that the reasons for your termination was because how old you were?
>
> A. I didn't read anything, no.

(Petitioner's Appendix at 14(a)-15(a)). Therefore, the allegations in Petitioner's affidavit directly contradicted his prior sworn deposition testimony. Furthermore, Respondent's corporate executives strongly denied that they ever verbalized such a statement. (Petitioner's Appendix at 15(a)-16(a)). Thus, the District Court determined that Petitioner's allegation was insufficient to constitute direct evidence of age discrimination. (Petitioner's Appendix at 16(a)).

In addition, Petitioner attempts to mislead this Honorable Court by alleging that the District Court ignored certain EEOC records. (Petition at 9). However, the alleged EEOC documents were never made a part of the record that was before the District Court or the Third Circuit Court of Appeals. In an effort to include said EEOC documents as part of the record, Petitioner filed a "Motion to File Supplemental Appendix". However, the Third Circuit Court of Appeals properly denied said Motion on December 21, 1995. (Respondent's Appendix at 1(a)).

Even if the statements in the Petitioner's Affidavit were considered, the statements do not meet the criteria of direct evidence of age discrimination. In Perry v. Prudential-Bache Securities, Inc., 738 F. Supp. 843 (D.N.J. 1989) aff'd. 904 F.2d 696 (3d Cir. 1990) cert. denied 498 U.S. 958, 112 L.Ed.2d 397, 111 S.Ct. 386 (1990), the Court found that certain statements made by the employer do not amount to evidence

of discrimination. Specifically, remarks that were in bad taste such as "how old you say this guy is" or "when does this guy say he's going to retire" were not considered direct evidence. Id. at 851. Moreover, a supervisor's alleged angry reference to an employee as "stupid old bastard" who was "burned-out and forgetful" did not establish direct evidence of discrimination. Id. Nor did the firm's statements that it was looking for "new blood" or "new leadership" constitute direct evidence of age discrimination. Id. at 853 n. 5.

It must be remembered that "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." Loeb v. Textron, Inc., 600 F.2d 1003 (1st. Cir. 1979); see also Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988) (manager's comments that employee "moved in slow motion," and "was not proactive" and "was not

aggressive" did not constitute direct evidence of age discrimination); Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209 (E.D.Pa. 1982)(executive's comment that employee had "been around since the dinosaurs roamed the earth" was insufficient to be direct evidence).

In the present case, there is no direct evidence of age discrimination. The record is replete with examples where Respondent reprimanded Petitioner prior to his termination because of inadequate performance, and Petitioner's acknowledgement thereto. (See Respondent's Memorandum of Law in Support of Motion for Summary Judgment at 5-6; and Respondent's Brief in the United States Court of Appeals for the Third Circuit at 6-7- Respondent's Appendix at 10(a)). In this context, the alleged statement regarding "a couple of young bucks" would pertain to Respondent's utter exasperation with Petitioner's failure to act vigorously and competently in the execution of his duties.

Perry supra at 851. Therefore, Petitioner's fabricated allegation regarding "a couple of young bucks" does not constitute direct evidence of age discrimination.

II. THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER FAILED TO ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

Petitioner failed to establish a *prima facie* case of age discrimination because a preponderance of the evidence did not show that Petitioner was ultimately replaced by a younger employee. (Petitioner Appendix at 16(a)). One of Respondent's existing employees, who was roughly seven years older than Petitioner, indicated in a sworn affidavit and testified at a hearing in the related Preliminary Injunction case, that he assumed approximately 80-90% of the sales route that was formerly part of Petitioner's duties. (Petitioner Appendix at 16(a)-17(a)). Furthermore, the District Court concluded that a preponderance of the evidence indicated that another three of Respondent's employees, who were not in the protected

category, did not replace Petitioner. (Petitioner's Appendix at 17(a)-18(a)).

Respondent submits that Petitioner failed to establish a *prima facie* case under the framework established in McDonnell Douglas Corp v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); Gray v. New York Newspapers, Inc., 957 F.2d 1070 (3d Cir. 1992). Here, Petitioner could not demonstrate that he was replaced by a sufficiently younger person. Although this Honorable Court has allowed age discrimination claims involving the replacement by someone within the protected class, this does not apply in these circumstances whereby Petitioner was replaced by an employee who was substantially older. cf. O'Connor v. Consolidated Coin Caterers, 1996 U.S. Lexis 2168 (April 1, 1996/ No. 95-354). Therefore, summary judgment was appropriate in the case at bar.

Furthermore, Petitioner attempts to mislead this Honorable Court by alleging that the District Court failed to hold an *in camera*

hearing. (Petition at 14-16). However, the record reflects that the Petitioner never filed a Motion to Compel the Production of the "monthly products summary report". (See Respondent's Third Circuit Brief at 4-Respondent's Appendix at 16(a)). In addition, Petitioner never made a formal request for an *in camera* inspection of records; nor did Petitioner ever file an Affidavit for a Continuance of the Determination of Respondent's Motion for Summary Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents. As a result, Petitioner failed to preserve this issue for appeal.

**III. THE DISTRICT COURT PROPERLY DETERMINED THAT RESPONDENT ESTABLISHED LEGITIMATE BUSINESS REASONS FOR THE TERMINATION, AND THAT AGE WAS NOT A DETERMINATIVE FACTOR IN THE TERMINATION OF PETITIONER.**

Petitioner misconstrues the law under ADEA by condemning the District Court for finding that "the weight of the evidence" indicates that Petitioner's job performance was unsatisfactory. (Petition at 16-18).

This Honorable Court has held that there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986). If the claim is merely colorable, or is not significantly probative, summary judgment may be granted. Id. In this case, the Petitioner has failed to present sufficient evidence to demonstrate that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 912 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

It is well-established law that if the employee establishes a *prima facie* case, the burden then shifts to the employer to dispel the inference by articulating legitimate, non-discriminatory business reasons for the employee's dismissal. McDonnell Douglas supra 411 U.S. at 802. If this burden is met by the employer, the employee is then required to demonstrate, by a preponderance of the evidence,

that the articulated reasons are a pretext for the discrimination. Teamsters v. United States, 431 U.S. 324, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977). Furthermore, the employee has the burden of proving that age was the determinative factor in the employer's decision to terminate the employee. Gray supra. at 1078.

In this case, Petitioner failed to establish any evidence showing that a discriminatory reason motivated Respondent in the termination. There was no pattern of discrimination in Respondent's employment practices, and Petitioner offered no evidence that the termination of Petitioner was due to his age. (Petitioner's Appendix at 28(a)-29(a)).

It was uncontroverted in the record that Petitioner's sales in Territory 60 were grossly deficient. It was further established by a preponderance of the evidence that Petitioner's performance was unsatisfactory because of his failure to adhere to company policy, including

the number of required overnight visits, filing of weekly expense reports, insubordinate behavior and lackluster performance. (Petitioner's Appendix at 29(a)).

Therefore, Respondent set forth numerous legitimate, non-discriminatory reasons for Petitioner's termination, and Petitioner failed to establish any evidence indicating that Respondent's reasons for termination were not credible. Additionally, Petitioner failed to show that age was a determinative factor in his termination. As a result, summary judgment was appropriate in this case.

## CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

**STEVENS & JOHNSON**

HERBERT M. RAFNER, ESQUIRE
Counsel of Record for
Respondent, Insulation
Corporation of America

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Allentown, PA 18101
(610) 439-1451

ORDER

The foregoing Motion is Denied. The supplemental appendix is received for the information of the Court only.

For the Court,

P. Douglas Sisk

Dec. 21, 1995

UNITED STATES COURT OF APPEAL
THIRD CIRCUIT

GARY L. BROBSTON,

Appellant

No. 95-1491

vs.

INSULATION CORP. OF AMERICA,
Appellee

APPELLANT'S MOTION TO FILE SUPPLEMENTAL APPENDIX

And now comes the Appellant, Gary L. Brobston, by and through his attorneys, Orloski & Hinga, and moves the Court for leave to file a Supplemental Appendix for the following reasons:

1. This case was orally argued before a three judge panel of **BECKER, J., ROTH, J.** and

LEWIS, J. on Monday, December 11, 1995.

2. At oral argument, the three judge panel express interest in the employer's **"young bucks"** statement to Appellant at time of termination, and if there was anything in the record to indicate whether or not the Appellant made this claim prior to his affidavit in opposition to the Defendant's Motion For Summary Judgment.

3. In the official documents filed with the E.E.O.C., Appellant, **personally**, wrote a letter dated June 20, 1994 directly to the E.E.O.C. without the involvement of counsel wherein this exact verbiage was used:

> "On August 16th, 1993 I was terminated from my employment by Mr. Tom Higgins, President of Insulation Corp. of America, and this was witnesses by M. William Dean, Executive Vice President of Insulation Corp. of America. The reason given to me for the termination was that the company could not afford me anymore, and the **'for what I was being paid they could hire a couple of young bucks'**. At that time I offered to take a paycut if that would help, but to no avail."
>
> Letter, Brobston to Lamb, E.E.O.C., June 20, 1994

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| GARY L. BROBSTON, | : | CIVIL ACTION |
| | : | |
| Plaintiff | : | No. 94-3315 |
| | : | |
| vs. | : | |
| | : | |
| INSULATION CORPORATION OF AMERICA, | : | JURY TRIAL DEMANDED |
| | : | |
| Defendant | : | |

---

**DEFENDANT, INSULATION CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT**

---

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Timothy T. Stevens
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(610) 439-1451
Attorney for Defendant,
Insulation Corporation
of America

para. 7-18; Higgins Aff. at para. 3-9; Brobston N.T. 38, 56-60, 67-69, 75-77, 83-87, 89-91; Tshudy N.T. at 33; Boston N.T. at 22 - See Exhibits 7,8, & 15).

Plaintiff's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff. at para. 13; Higgins Aff. at para. 3-7,9 -See Exhibits 7 & 8). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff. at para. 14; Higgins Aff. at para. 8 - See Exhibits 7 &8).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff. at para. 7,8,11,12,15; Higgins Aff. at para. 4-7, Brobston N.T. at 84-87 - See

Exhibits 7, 8 &16). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff. at para. 4,5 -See Exhibit 7) and after his termination at ICA. (Dean Aff. at para. 16 - See Exhibit 7). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closet at home. (Dean Aff. at para. 17; Brobston N.T. 91-94/Brobston Ex. 2 - See Exhibits 7 & 17). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY
PENNSYLVANIA

CIVIL DIVISION

| | | |
|---|---|---|
| INSULATION CORPORATION OF AMERICA, Plaintiff | : | 93-E-107 |
| v. | : | |
| GARY L. BROBSTON, Defendant | : | |

ORDER

NOW, this 27 day of March, 1996, the Court finds the defendant, Gary Brobston, in contempt of court. The parties, by praecipe for hearing, may request that the Court impose sanctions for the contempt only if:

1) Defendant does not immediately cease and desist from disclosing or utilizing, in any fashion, all information contained in the document regarding sales territory 80 which document was the subject of this hearing; and

2) Defendant does not, within ten (10) days, deliver this document and all copies of it to plaintiff's counsel. The plaintiff's

request for counsel fees and costs is denied.[1]

---

[1] The defendant, Gary Brobston, was employed by Insulated Corporation of America (hereafter "ICA") from October of 1982 to August of 1993. During the course of his employment, the defendant entered an employment contract, which contained a covenant not to compete. In addition, the employment contract contained a provision that all documents and confidential information used in the course of the defendant's employment remained the property of ICA and were not to be removed from the company's premises without prior written permission. Such information was not to be used or disclosed to anyone except in the course of the defendant's employment.

On August 13, 1993, the defendant was terminated from his employment with ICA. After his termination from ICA, the defendant began working for New England Foam Plastics (hereafter "NEFP").

The document in question contains information regarding the defendant's sales performance in territory 80. The document also contains information regarding yearly sales, selling prices and product information. Both parties are in agreement that this document contains confidential information and should have been turned over at the time of the defendant's termination.

The defendant claims he found the document in question in a closet approximately three and one-half months after he was terminated from ICA. After finding the document, the defendant placed the document in a drawer and

forgot about it.

While working for NEAP, the defendant contacted certain customers of ICA. The defendant alleges he did not use information contained in the confidential document to do so nor did he give NEAP the confidential document or reveal any of its content. By the evidence, we are not convinced otherwise.

On December 30, 1993, after full hearing, the Court granted ICA's request for a preliminary injunction upholding the restrictive covenant in the defendant's employment contract. The defendant was enjoined from using or disclosing any confidential information obtained during the course of his employment with ICA and from competing with ICA within a 300 mile radius of Allentown.

On or about May 27, 1994, the defendant filed a complaint in the United States District Court alleging he was terminated on the basis of age. During the defendant's deposition in the federal action, the defendant produced the confidential ICA business record in question. A summary judgment motion of ICA was granted and the suit was dismissed.

After discovering the defendant was in possession of the subject document, the attorney for ICA requested that the attorney for the defendant return to ICA the confidential business document. Defendant's attorney refused. As a result, on March 30, 1995, ICA filed a motion to hold the defendant in contempt of the December 30, 1993 injunction.

9(a)

By the Court:

/s/William E. Ford, J.

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On April 10, 1995, a hearing was held on ICA's petition for contempt. During the defendant's testimony, the defendant stated that, if he knew he had this document when he was terminated, it was the type of document that should have been turned over to ICA. Therefore, the defendant must deliver the document and all copies of it within ten (10) days to ICA's counsel.

ICA's request for costs and counsel fees is DENIED. "Costs are not of course in equity. They may be given or withheld as equity and good conscience require." Pile v. Pedrick, 167 Pa. 296, 300, 31 A. 646, 647 (1895).

Costs are denied because, although the defendant admits he is in possession of the document, ICA failed to demonstrate that defendant utilized or disclosed the information contained in the document. Actually, it is this lack of proof of use of the document that causes us not to presently impose sanctions. Counsel fees are denied because counsel fees in equity are generally not allowable as costs associated with the action except under limited circumstance, none of which is applicable here. Hempstead v. Meadville Theological School, 286 Pa. 493, 134 A. 103 (1926).

10(a)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

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|---|---|---|
| GARY L. BROBSTON, | : | CIVIL ACTION |
| | : | |
| Plaintiff | : | No. 94-3315 |
| | : | |
| vs. | : | |
| | : | |
| INSULATION CORPORATION OF AMERICA, | : | JURY TRIAL DEMANDED |
| | : | |
| Defendant | : | |

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**DEFENDANT, INSULATION CORPORATION OF AMERICA'S MOTION FOR SUMMARY JUDGMENT**

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(610) 439-1451
Attorney for Defendant,
Insulation Corporation
of America

para. 7-18; Higgins Aff. at para. 3-9; Brobston N.T. 38, 56-60, 67-69, 75-77, 83-87, 89-91; Tshudy N.T. at 33; Boston N.T. at 22 - See Exhibits 7,8, & 15).

Plaintiff's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff. at para. 13; Higgins Aff. at para. 3-7,9 -See Exhibits 7 & 8). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff. at para. 14; Higgins Aff. at para. 8 - See Exhibits 7 &8).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff. at para. 7,8,11,12,15; Higgins Aff. at para. 4-7, Brobston N.T. at 84-87 - See

Exhibits 7, 8 &16). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff. at para. 4,5 -See Exhibit 7) and after his termination at ICA. (Dean Aff. at para. 16 - See Exhibit 7). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closet at home. (Dean Aff. at para. 17; Brobston N.T. 91-94/Brobston Ex. 2 - See Exhibits 7 & 17). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in order to inflict further incalculable damage on ICA especially upon the fast approaching expiration of the covenant not to compete in August of 1995. (Dean Aff. at para. 18 - See Exhibit 7).

Alan Colorito began his employment at ICA on March 22, 1993. (Colorito N.T. at 7 - See Exhibit 18). He replaced Gregory Kester in the

roofing sales position at ICA. (Colorito N.T. 14, 17 - See Exhibit 19). Mr. Colorito was the only person who covered the approximate 75-80 roofing accounts in Territory 90. (Colorito N.T. 17, 24; Brobston N.T. at 25; Tshudy N.T. at 32 - See Exhibit 20). Joyce Tshudy handled the commodity sales in territory 10; Michael Marsh handled the commodity and national accounts in territories 20 & 30; and Gary Brobston covered sales in territories 60 & 80. (Brobston N.T. at 25-27/Brobston Ex. 1 - See Exhibit 21). Mr. Brobston estimated that the total number of ICA customers in territory 80 was only 15 percent; and only a meager 2 percent were located in territory 60. (Brobston N.T. 27-29 - See Exhibit 22). Brobston further testified that there was no appreciable increase in the 2 percent of customers located in territory 60 during the time period that he was in charge from 1992 until August of 1993. (Brobston N.T. at 29 - See Exhibit 23). Brobston never met the projected budget during any of the months in

1993 for territory 60. (Brobston N.T. 57-59 - See Exhibit 24).

When Brobston left, Mr. Colorito only took over one (1) of his accounts. (Colorito N.T. at 29 - See Exhibit 25). Joyce Tshudy estimated that she only received about eight (8) of Brobston's accounts when he departed. (Tshudy N.T. at 27 - See

15(a)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 95-1491

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GARY L. BROBSTON,

Appellant

vs.

INSULATION CORPORATION OF AMERICA, INC.

Appellee

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# APPELLEE'S BRIEF

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Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania per the Honorable Arnold C. Rapoport, United States Magistrate Judge, dated May 23, 1995, denying Plaintiff's Motion To Reconsider Order of April 5, 1995 granting Defendant's Motion for Summary Judgment.

Howard S. Stevens,
Attorney for Defendant
/Appellee

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Allentown, PA 18101
(610) 439-1451

case No. 94-3315, ICA filed a Motion for Summary Judgment. On April 5, 1995, the District Court granted ICA'S Motion for Summary Judgment. On May 23, 1995, the District Court denied Plaintiff's Motion to Reconsider the order granting Summary Judgment.

On or about May 25, 1995, Brobston filed the herein appeal with this Honorable Court. In his Brief, Brobston makes repeated unverified assertions that he should have been entitled to take the deposition of ICA employee, Michael Marsh; and ICA should have produced a "Monthly Product Summary Report" (Appellant's Brief at 2, 7, 10, 19, 21, 22-24). However, Brobston never filed a Motion to Compel the production of this alleged "Monthly Product Summary Report". (See docket entries--R. at 1a-4a). Also, he never issued a notice for the deposition of Michael Marsh either before or after the close of discovery. Furthermore, Brobston failed to file an affidavit for a continuance of the determination of ICA's Motion for Summary

Judgment pursuant to F.R.Civ.P. 56(f) in order to obtain additional documents or to take depositions. Id. As a result, Brobston has failed to preserve this issue for appeal.

customers, refusing to consistently submit call reports and expense accounts on a weekly basis, spending too much time at the plant in Allentown, failing to adequately call on customers, making overcharges and improperly using the ICA credit card. (Dean Aff.--ICA Supp. R. at 506a-511a; Higgins Aff.--R. at 126a-130a; Brobston N.T.--R. at 155a-174a; Tshudy N.T.--R. at 175a; Boston N.T.--R. at 176a).

Brobston's performance as Vice-President of Specialty Products was grossly inadequate because there were negligible sales in Territory 60 during his tenure from November 1992 until August of 1993. (Dean Aff.--ICA Supp. R. at 509; Higgins Aff.--R. at 126a-130a). Furthermore, the increase in Territory 80 was not attributable to the efforts of Mr. Brobston. Rather, the growth was due to the curing of a product defect, and the efforts of Mr. Dean whereby he negotiated a contract with a significant customer, Atlantic Packaging. (Dean Aff.--ICA Supp. R. at 509-510; Higgins Aff.--R.

at 127a-130a).

Mr. Brobston was reprimanded on numerous occasions for his inadequate performance. (Dean Aff.--ICA Supp. R. at 506a-510a; Higgins Aff.--R. at 126a-130a, Brobston N.T.--R. at 168a-171a). Mr. Brobston lacked the honesty and integrity to maintain his position at ICA which is illustrated by his attempt to disclose confidential business information before (Dean Aff.--ICA Supp. R. at 506a) and after his termination at ICA. (Dean Aff.--ICA Supp. R. at 510a-511a). The unscrupulous conduct of Brobston is further underscored by his blatant disregard of refusing to return confidential ICA business records which allegedly were discovered in his closed at home. (Dean Aff. at para. 17; Brobston N.T.--R. at 177a-182a). Mr. Dean submits that Brobston is using these legal proceedings as a mere subterfuge in order to inflict further incalculable damage on ICA especially upon the fast approaching expiration of the covenant not

to compete in August of 1995. (Dean Aff. at para. 18--ICA Supp. R. at 511a).

Alan Colorito began his employment at ICA on March 22, 1993. (Colorito N.T.--R. at 187a). He replaced Gregory Kester in the roofing sales position at ICA. (Colorito N.T.--R. 1881-189a). Mr. Colorito was the only person who covered the approximate 75-80 roofing accounts in Territory 90. (Colorito N.T.--R. at 190a-191a; Brobston N.T.--R. at 192a; Tshudy N.T.--R. at 193a). Joyce Tshudy handled the commodity sales in territory 10; Michael Marsh handled the commodity and national accounts in territories 20 & 30; and Gary Brobston covered sales in territories 60 & 80. (Brobston N.T.--R. at 194a-197a). Mr. Brobston estimated that the total number of ICA customers in territory 80 was only 15 percent; and only a meager 2 percent were located in territory 60. (Brobston N.T.--R. at 198a-200a). Brobston further testified that there was no appreciable increase in the 2 percent of customers located in territory 60

during the time period that he was in charge from 1992 until August of 1993. (Brobston N.T.--R. at 200a). Brobston never met the projected